(14)

No. 04-905

In the Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC., PETITIONER

v.

REEDER-SIMCO GMC, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

R. HEWITT PATE
Assistant Attorney General

THOMAS G. HUNGAR
Deputy Solicitor General

MAKAN DELRAHIM
Deputy Assistant Attorney General

JONATHAN L. MARCUS
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN
DAVID SEIDMAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

WILLIAM BLUMENTHAL
General Counsel
Federal Trade Commission
Washington, D.C. 20580

QUESTION PRESENTED

Whether a manufacturer that offers different wholesale prices to its dealers may be held liable for unlawful price discrimination under Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a), in the absence of a showing that it discriminated between dealers competing to resell its product to the same retail customer.

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INTEREST OF THE UNITED STATES

The Department of Justice and the Federal Trade Commission (FTC) enforce the federal antitrust laws. The FTC has developed much of the jurisprudence under the Robinson-Patman Act through administrative enforcement proceedings. This case presents significant questions concerning the reach of that Act's prohibition of price discrimination. Because those questions implicate the pro-competition policies that underlie the antitrust laws generally and that inform the proper interpretation of the Robinson-Patman Act in particular, the government has a substantial interest in their correct resolution.

STATEMENT

Respondent Reeder-Simco GMC, Inc. (Reeder) was an authorized dealer in heavy trucks manufactured by petitioner Volvo Trucks North America, Inc. (Volvo). Reeder

sued Volvo, claiming that Volvo violated Section 2(a) of the Clayton Act, ch. 323, 38 Stat. 730, as amended by the Robinson-Patman Anti-Discrimination Act, 15 U.S.C. 13(a) (Robinson-Patman Act or the Act), by discriminating in the prices it charged its dealers for heavy trucks. The Robinson-Patman Act provides, in relevant part:

> It shall be unlawful for any person engaged in commerce * * * to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

15 U.S.C. 13(a). A jury found Volvo liable and awarded damages. The district court denied Volvo's motion for judgment as a matter of law, and the court of appeals affirmed. Pet. App. 1a-27a.

1. Volvo manufactures heavy trucks. Reeder, whose dealership is located in Fort Smith, Arkansas, became an authorized Volvo heavy-truck dealer in 1995, pursuant to a five-year franchise agreement with automatic one-year extensions if Reeder met sales objectives established by Volvo. Pet. App. 2a. Reeder generally sold Volvo's trucks through a competitive bidding process. *Id.* at 2a-3a. That process works as follows: a potential heavy-truck buyer (customer) seeks bids from several dealers. The customer's choice of dealers from which to seek bids is influenced "by such factors as an existing relationship, geography, reputation, and cold calling or other marketing strategies initiated by individual dealers." *Id.* at 28a-29a (Hansen, J., concurring in part and dissenting in part). Once a Volvo dealer such as Reeder receives the customer's specifications, it turns to

Volvo and seeks a discount (concession) off the wholesale price (which Volvo set at 80% of the published retail price). *Id.* at 2a. Volvo's precise method for calculating the concession offered a dealer is kept confidential to protect its ability to compete with other manufacturers. *Id.* at 2a-3a.

The concession that Volvo provides to a dealer is effectively an offer to sell, which the dealer uses to determine the price that it, in turn, will offer to the retail customer. The dealer purchases the trucks from Volvo only in the event its bid to the customer is successful. Pet. App. 2a. If the dealer's bid is successful and it purchases the trucks, Volvo proceeds to build them to meet the customer's specifications. *Ibid.*; C.A. App. 1485.

Reeder was one of many Volvo dealers, each of which is assigned a geographic territory. Reeder's territory included ten counties in Arkansas and two in Oklahoma. Pet. App. 11a. Nothing prohibits a Volvo dealer from bidding outside its territory, but Reeder rarely bid against another Volvo dealer. *Id.* at 4a, 11a-12a. And when more than one Volvo dealer is solicited by the same retail customer, Volvo's stated policy was to provide the same price concession to the Volvo dealers competing head-to-head for the sale. C.A. App. 1161-1162, 1621.

In 1997 Volvo announced its "Volvo Vision" program, designed to meet "Volvo's challenges" in the market for heavy trucks, including Volvo's perception that it had too many dealers serving areas that were too small. Pet. App. 3a. Reeder "came to suspect it was one of the dealers Volvo sought to eliminate" and to believe that other Volvo dealers were receiving more favorable price concessions. *Id.* at 4a.

2. Reeder filed suit against Volvo in February 2000, alleging secondary-line injury from price discrimination under

the Robinson-Patman Act.[1] At trial, Reeder's vice-president, William E. Heck, acknowledged that Volvo's policy was to offer equal concessions to Volvo dealers bidding against one another for a particular contract, but he contended that the policy "was not executed." C.A. App. 1162. Reeder offered evidence concerning two occasions over the course of the five years of its authorized dealership when Reeder bid against other Volvo dealers for a particular sale. Pet. App. 4a, 12a.[2] On one occasion, Volvo ultimately offered both dealers the identical concession (18.9%), and neither won the bid. C.A. App. 1267-1273, 1628. The other occasion involved Hiland Dairy, which solicited bids from both Reeder and Southwest Missouri Truck Center. The record reveals that Volvo offered the two dealers the same concession, and Hiland selected Southwest Missouri (from which it had purchased trucks before). *Id.* at 1626-1627. After selecting Southwest Missouri, however, Hiland insisted on the price that Southwest Missouri had bid prior to a general increase in Volvo's prices, and Volvo only then increased the discount. *Id.* at 1627. Compare *id.* at 1625-1628 with *id.* at 1483-1488; see Pet. App. 31a (Hansen, J., concurring in part and dissenting in part).

Reeder also presented evidence comparing the concessions available to it when it bid against non-Volvo dealers to

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[1] "Secondary-line" injury is injury to competition at the level of a customer of the discriminating seller. The complaint also alleged "primary-line" injury (injury to competition at the level of the discriminating seller), but the district court granted Volvo summary judgment on that claim, Pet. App. 40a, and it is not at issue here. The complaint also alleged state law causes of action, including a claim under the Arkansas Franchise Practices Act on which Reeder prevailed before a jury and on appeal. That claim too is not at issue here.

[2] Heck testified that Reeder had competed with another Volvo dealer for a sale two or three times, C.A. App. 1489-1490, but the court of appeals mentioned only the two instances detailed in the appellate record.

concessions available to other Volvo dealers bidding for other sales. Reeder's evidence compared the concessions it received on four occasions when it bid successfully against non-Volvo dealers (and thus purchased Volvo trucks) with the more favorable concessions available to other successful Volvo dealers in connection with different sales on which Reeder did not bid. Pet. App. 4a-6a.[3] Additionally, Reeder offered a comparison of the concessions Volvo offered it on occasions when it bid unsuccessfully against non-Volvo dealers (and therefore did not purchase Volvo trucks) with more favorable concessions available to other Volvo dealers when they made different sales on which Reeder did not bid. *Id.* at 6a.

Heck testified that, in assembling that information, Reeder did not look for instances in which Reeder received a *larger* concession than another Volvo dealer, although it was "quite possible" such instances occurred. C.A. App. 1462. Nor did Reeder perform a statistical analysis to determine whether Reeder was disfavored on average as compared to other dealers. *Id.* at 1462-1464.

The jury found that there was "a reasonable possibility that discriminatory pricing may harm competition between [Reeder] and other retail dealers of Volvo trucks," and that Volvo's discriminatory pricing injured Reeder. Pet. App. 38a. It further found that Reeder's damages from Volvo's Robinson-Patman violation exceeded $1.3 million. *Ibid.* The district court summarily denied motions for judgment as a matter of law and new trial or remittur (*id.* at 35a), awarded treble damages, and entered judgment. *Id.* at 33a.

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[3] The comparisons involved sales that were as far as seven months apart and that were for trucks containing different components. Pet. App. 4a-6a, 12a-13a; see C.A. App. 1574-1584. None of the sales-to-sales comparisons involved a dealer with which Reeder had competed in the head-to-head comparisons.

3. A divided panel of the court of appeals affirmed. Pet. App. 1a-32a. The court recognized that to prove a Robinson-Patman Act violation, Reeder had to establish several elements, including that (1) "Volvo discriminated in price between Reeder and the favored dealers"; and (2) "this price discrimination substantially affected competition between Reeder and the favored dealers."[4] *Id.* at 8a. With respect to the first element, the court explained that, "because the [Act] prohibits price discrimination 'between different purchasers,' * * * Reeder had to show there were actual sales at two different prices to two different Volvo dealers, i.e., a sale to itself and a sale to another Volvo dealer." *Ibid.* (quoting 15 U.S.C. 13(a)). Noting that "an unsuccessful bidder is not a purchaser within the meaning of the [Act]," *id.* at 9a, the court relied entirely on the evidence of the four occasions on which Reeder bid successfully against non-Volvo dealers in finding the two-purchase requirement satisfied. It concluded that those four Reeder purchases "gave Reeder 'purchaser' status," making Reeder eligible "to pursue a claim for price discrimination." *Id.* at 10a.

Although Reeder and the other Volvo dealers involved in the sales comparisons did not bid against each other, and although no other comparisons involved Reeder purchases from Volvo, the court next concluded that Reeder established that it was a purchaser "in actual competition with" the favored dealers because "as of the time the price differential was imposed, the favored and disfavored purchasers competed at the same functional level, i.e., all wholesalers or all retailers, and within the same geographic market." Pet. App. 11a (quoting *Best Brands Beverage, Inc.* v. *Falstaff Brewing Corp.*, 842 F.2d 578, 585 (2d Cir. 1987)).

[4] Reeder also had to show that "the trucks sold by Reeder and the other dealers were of like grade and quality." Pet. App. 8a. The court concluded that although the sales Reeder identified as a basis for comparison involved trucks with different components, *id.* at 12a-13a; see C.A. App. 1572-1584, a jury could properly conclude that the trucks in each comparison were "commodities of like grade and quality," 15 U.S.C. 13(a). Similarly, although the sales that Reeder compared were made at different times, the court held that they were sufficiently close in time for purposes of establishing price discrimination under the Act. Pet. App. 14a.

The court further held that Reeder could prove competitive injury from price discrimination by showing a "reasonable possibility" that the effect of the discrimination "may be substantially to lessen competition . . . or to injure, destroy, or prevent competition." Pet. App. 14a-15a (quoting 15 U.S.C. 13(a)). The court explained that Reeder could make that showing by "introduc[ing] direct evidence that disfavored competitors lost sales or profits as a result of the discrimination," *id.* at 15a (quoting *Rose Confections, Inc.* v. *Ambrosia Chocolate Co.*, 816 F.2d 381, 385 (8th Cir. 1987)), or by showing "that the favored competitor received a substantial price reduction over a substantial period of time," *ibid.* (quoting *Rose Confections*, 816 F.2d at 385).

The court found that Reeder met both tests. It reasoned that the jury could find that the price discrimination injured Reeder based on evidence that Volvo intended to reduce the number of its dealers, Reeder's loss of the Hiland Dairy contract, Reeder's potential profit had it received the concessions that other dealers received, and Reeder's declining sales. Pet. App. 15a-16a. As for the second test, the court found that the evidence showed "that favored competitors received substantial price reductions over a substantial period of time." *Id.* at 15a.

The court also concluded that Reeder was entitled to treble damages for the Robinson-Patman Act violation found by the jury. The court held that, for the purpose of finding "actual injury" to Reeder and assessing damages, the jury was not limited to evidence of head-to-head competition with favored Volvo dealers or evidence comparing the concessions given to Reeder and other Volvo dealers on the sales they

made. Pet. App. 17a, 20a. Rather, the jury could also rely on evidence of Reeder's "unsuccessful sales due to Volvo's failure to grant requested price concessions." *Id.* at 17a. The court further held that the jury could infer from the evidence that "favored dealers received lower prices," and that "this price advantage allowed other dealers to undercut Reeder's prices, hurting Reeder's sales and profits." *Id.* at 19a. Taking into account evidence that "the elimination of some dealers like Reader appeared to be Volvo's intent," the court concluded that Reeder had established "precisely the type of injury the antitrust laws were meant to prevent." *Ibid.*

Judge Hansen dissented with respect to the Robinson-Patman Act claim. Pet. App. 27a-32a. He concluded that Reeder "fail[ed] to show injury or likelihood of injury to actual competition between Reeder and the 'favored' Volvo dealers," in essence because "the parties in this case operate in a unique marketplace where special-order products are sold to individual, pre-identified customers only after competitive bidding. By its very nature, this process will never produce the kind of competition the [Act] was designed to protect because it will never result in the type of two-purchase transaction that itself creates a market for the goods that are sold." *Id.* at 27a-28a. There may be competition among dealers for the opportunity to bid on potential sales, but "[o]nce bidding begins, * * * the relevant market becomes limited to the needs and demands of a particular end user, with only a handful of dealers competing for the ultimate sale." *Id.* at 29a. Judge Hansen reasoned that the instances Reeder identified in which it was a "purchaser"—the only instances that could satisfy the Act's two-purchaser requirement—were "simply * * * not relevant to proving a violation of the [Act] because there was no actual competition between the two dealers at the time of the sales to the separate and different end users." *Ibid.* And "[w]ithout proof of actual competition" for the same customer(s) when the requisite purchases were made, "Reeder cannot demonstrate a reasonable possibility of competitive injury." *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals' decision cannot be reconciled with the terms of the Robinson-Patman Act or the policies the Act was designed to advance. The court of appeals lost sight of the fact that this case lacks the essential prerequisites for a Robinson-Patman Act claim. As Judge Hansen recognized, this case involves a unique product that is subject to special order and is sold through a customer-specific competitive bidding process. That process forecloses the type of competition between different purchasers for resale of the purchased product that the Robinson-Patman Act's prohibition on secondary-line price discrimination was designed to address. Equally important, there is no evidence of price discrimination in the rare instances in which Reeder competed with another Volvo dealer to make a sale. This case thus lacks the essential feature of price discrimination among competitors. As a result, Reeder cannot claim to have suffered the kind of injury that the Robinson-Patman Act seeks to remedy. Whatever rights Reeder may have under state laws designed to protect franchisees, the secondary-line prohibitions of Section 2(a) of the Robinson-Patman Act do not address practices not involving price discrimination between competing purchasers.

In this case, the court of appeals extended the Robinson-Patman Act's prohibition on secondary-line price discrimination to protect a firm that did not compete with a favored purchaser and thus did not suffer price discrimination within the meaning of the Act. Reeder offered no evidence that its supplier, Volvo, ever offered it a less favorable price than it offered to another Volvo dealer competing against Reeder for a sale. Despite the absence of competition between

Reeder and the favored Volvo dealers to resell trucks purchased from Volvo at different prices, the court of appeals found sufficient evidence to uphold a jury finding of liability, a result that finds no support in the statutory language or purpose and that threatens to undercut the pro-competitive policies of the antitrust laws.

This Court's Robinson-Patman secondary-line cases have emphasized that the Act addresses "price differentials between *competing* purchasers sufficient in amount to influence their resale prices." *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 47 (1948) (emphasis added). In cases involving such "competing purchasers," this Court has permitted competitive injury to be inferred from price discrimination between them over a substantial period of time. *Id.* at 50; *Falls City Indus., Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983). That inference is unavailable to Reeder, however, because it failed to establish that it was the victim of price discrimination affecting competition for sales between it and favored Volvo dealers.

Construing the Robinson-Patman Act to reach the varying prices at which a manufacturer sells to its dealers when they do not compete with each other for a sale could severely restrict a manufacturer's ability to compete effectively with other manufacturers. It would sacrifice vibrant interbrand competition, the "primary concern of antitrust law," *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19 (1977), for an illusory gain in intrabrand competition. The Robinson-Patman Act requires no such anti-competitive result.

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING THAT VOLVO VIOLATED THE ROBINSON-PATMAN ACT

"It is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.'" *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962)). As this Court explained in *Brooke Group*, the Robinson-Patman Act is no exception. 509 U.S. at 220. The Act bans certain forms of price discrimination between actual competitors. The Act does not, however, ban price discrimination between purchasers who are not competing to resell the manufacturer's product to the same customer.[5]

The court of appeals failed to recognize that limitation here, upholding a finding of competitive harm from price discrimination in the absence of evidence that Reeder was in competition with the favored dealers. In so holding, the court of appeals ignored not only the language of the statute, but also the canon of construction that the Robinson-Patman Act, no less than the Sherman Act or other parts of the Clayton Act, "should be construed consistently with broader policies of the antitrust laws." *Brooke Group*, 509 U.S. at 220

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[5] The requisite competition to sell to the same customer may also occur downstream in the chain of distribution. See *Falls City Indus., Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983); 15 U.S.C. 13(a) (banning price discrimination between purchasers that may injure "competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them"). Reeder never alleged injury to competition with the customers of favored Volvo dealers, and so accordingly our formulations of the statutory requirement here do not, in general, highlight downstream competition, although they should be understood to encompass it.

(quoting *Great Atl. & Pac. Tea Co.* v. *FTC*, 440 U.S. 69, 80 n.13 (1979)).

A. Section 2(a) of The Robinson-Patman Act Does Not Prohibit All Price Differentials, But Targets Price Discrimination Between Competing Purchasers

1. Congress enacted the Robinson-Patman Act to remedy what it perceived as unfair and economically unjustified pricing concessions granted to large retail chains at the expense of competing independent merchants. See *FTC* v. *Fred Meyer Inc.*, 390 U. S. 341, 349-350 (1968); *FTC* v. *Henry Broch & Co.*, 363 U. S. 166, 169 (1960); Frederick M. Rowe, *Price Discrimination Under the Robinson-Patman Act* 11 (1962); 1 ABA Antitrust Section, Monograph No. 4, *The Robinson-Patman Act: Policy and Law* 21 (1980). A theme of the congressional debate on the Act was the need to combat the "increased market power and coercive practices of chainstores and other big buyers that threatened the existence of small independent retailers." *Great Atl. & Pac. Tea Co.* v. *FTC*, 440 U.S. 69, 75-76 (1979). Congressman Patman offered the following paradigmatic example:

> You have a chain store on one side of the street that is getting special benefits, special discounts, special commissions and bonuses, and they are enabled to put the same goods on their shelves as the independent across the street puts on his shelves at 20 percent less * * *. The independents, now, on the other side of the street, have not only got to compete with that corporate chain in their prices—because people do consider the price when they purchase goods in this country—but they must also extend credit and run the risk of getting their money after they let the goods go. They must also render special services like delivery, and things like that, in order to get any business at all.

To Amend the Clayton Act: Hearings on H.R. 8442, H.R. 4995, and H.R. 5062 Before the House Comm. on the Judiciary, 74th Cong., 1st Sess. 5 (1935) (testimony of Hon. Wright Patman) (Patman Testimony). Although price discrimination was already proscribed in Section 2 of the original Clayton Act, that law was considered inadequate to address the perceived harm to competition posed by the advent of the dominant chain store. See 3 Earl W. Kintner & Joseph P. Bauer, *Federal Antitrust Law* § 22.2, at 250-251 (1983).[6]

The Robinson-Patman Act's price discrimination provision thus focuses on the concern Congressman Patman identified: price discrimination between two purchasers that impairs the disfavored purchaser's ability to compete with the favored purchaser. It prohibits discrimination in price "between different purchasers of commodities of like grade and quality" (the commodities purchased for the shelves of the chain store and the independent across the street),[7] but only if the two purchasers are competing and if "the effect of such

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[6] As originally enacted, the Clayton Act outlawed price discrimination "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Clayton Act, ch. 323, § 2, 38 Stat. 730. Congress's focus in enacting the Clayton Act's price discrimination provision was primary-line injury, *Mennen Co.* v. *FTC*, 288 F. 774, 778-782 (2d Cir.), cert. denied, 262 U.S. 759 (1923), although this Court held that it reached some situations involving secondary-line injury, *George Van Camp & Sons Co.* v. *American Can Co.*, 278 U.S. 245, 251-54 (1929).

[7] The very nature of the market for heavy-duty trucks—that the trucks are built to meet a particular customer's specifications and include different components—casts doubt on the court of appeals' conclusion (Pet. App. 12a-13a) that the trucks involved in different competitive bids were "commodities of like grade and quality" within the meaning of the Act. 15 U.S.C. 13(a). As explained below, the court of appeals has taken the Act far afield by applying it to purchases of trucks with different components made months apart by dealers who were not competing to resell their trucks to the same customers.

discrimination may be substantially to lessen competition" generally "or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 15 U.S.C. 13(a). Thus, although the Act does not "require that the discriminations must in fact have harmed competition," *Corn Prods. Ref. Co.* v. *FTC*, 324 U.S. 726, 742 (1945), there must "be 'a reasonable possibility' of substantial injury to competition before its protections are triggered," *Brooke Group*, 509 U.S. at 222 (quoting *Falls City*, 460 U.S. at 434). See generally Herbert Hovenkamp, *The Robinson-Patman Act And Competition: Unfinished Business*, 68 Antitrust L.J. 125, 134-135 (2000). There can be no "reasonable possibility" of substantial injury to competition under the Robinson-Patman Act in the absence of price discrimination between purchasers in actual competition for the same customers.

In Congressman Patman's example, the connection between the price discrimination and the injury to the disfavored purchaser's ability to compete with the favored purchaser is straightforward and clear. As he noted, "people do consider the price when they purchase goods in this country." Patman Testimony 5. The potential customer, faced with the independent store on one side of the street and the chain store on the other, may choose to buy from the chain store at the lower price the discrimination enabled the chain store to charge, depriving the independent of the sale. Alternatively, the disfavored independent may attract the customer by lowering its price or increasing its services, thereby reducing its profits. In either case, the injury to the independent comes about and is covered by the Act because the independent is in "competition with" the chain store—*i.e.*, the party "who * * * knowingly receives the benefit of" the price discrimination, 15 U.S.C. 13(a)—in its efforts to resell the goods purchased from the manufacturer.

2. This Court's cases confirm that secondary-line price discrimination is cognizable under the Act only when the "purchases involved in such discrimination" (15 U.S.C. 13(a)) are made by purchasers who are competing to make sales. In *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), the defendant offered quantity discounts to all, but only five retail grocery store chains could take advantage of them. As a result, the chains could sell the salt at retail for less than wholesale purchasers "could reasonably sell the same brand of salt" to independent retailers competing with the chains' local stores. *Id.* at 41. The Court found it "self-evident," *id.* at 50-51, that evidence of "price differentials between *competing* purchasers sufficient in amount to influence their resale price of salt," *id.* at 47 (emphasis added), was sufficient to support a finding that there is a reasonable possibility of an adverse impact on competition. See also *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 546 (1960) ("The existence of competition among buyers who are charged different prices by a seller is obviously important in terms of adverse effect upon secondary line competition.").

The Court elaborated on *Morton Salt* in *Falls City Indus., Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983). Falls City, a brewer, sold beer to wholesaler Vanco at a higher price than it charged to wholesaler Dawson Springs. Although *Morton Salt* held that "injury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over time," 460 U.S. at 435 (citing *Morton Salt*, 334 U.S. at 46, 50-51), proof of the difference in price to the two wholesalers did not suffice to establish a violation because they "did not compete with each other at the wholesale level; Vanco sold only to Indiana retailers and Dawson Springs sold only to Kentucky retailers," *id.* at 436. The retailers to whom they sold, however, did compete with each other: Lower prices attracted Indiana customers to Kentucky to buy beer (as direct evidence of

diverted sales showed, see *id.* at 437 n.8), which led Indiana retailers to buy less from Vanco. Because the Act reaches downstream to the injury to the competing customers of favored and disfavored purchasers, that *retail diversion*—but not the wholesale price differential itself—satisfied the competitive injury element of a prima facie case. *Id.* at 436.[8]

As this Court's cases and the statutory language thus make plain, price discrimination made unlawful under Section 2(a) of the Robinson-Patman Act must, at a minimum, threaten "injury to purchasers who are in competition with each other." Wright Patman, *The Robinson-Patman Act* 15 (1938).[9] As explained below, because Reeder did not establish that Volvo engaged in price discrimination in any transaction in which Reeder was competing with another Volvo

[8] Similarly, in *Texaco Inc.* v. *Hasbrouck*, 496 U.S. 543 (1990), the Court held that an oil company's price discrimination between retailers and wholesale buyers who also sold at retail fell within the Act's prohibition, noting that "[t]o the extent" the wholesalers "competed with" the disfavored retailers for sales, the *Morton Salt* inference would be appropriate. 496 U.S. at 570. The evidence showed diversion of customers from the complaining retailers to gasoline stations supplied by the favored wholesalers. *Id.* at 571-72.

[9] Because, as explained in Part B, *infra*, the court of appeals erred in finding that Volvo engaged in price discrimination in any transaction in which Reeder was in actual competition with the favored dealers, this Court need not address the question whether proof of injury to a purchaser from price discrimination in favor of a competing purchaser suffices to establish the reasonable possibility of harm to competition required for a finding of liability for secondary-line injury under the Act. Compare, *e.g.*, *Boise Cascade Corp.* v. *FTC*, 837 F.2d 1127, 1143 (D.C. Cir. 1988) (requiring "[i]njury to competition"), with *Chroma Lighting* v. *GTE Prods. Corp.*, 111 F.3d 653, 655-657 (9th Cir.) (rejecting *Boise* and holding that proof of effect on individual competitor is sufficient), cert. denied, 522 U.S. 943 (1997), and *J.F. Feeser, Inc.* v. *Serv-A-Portion, Inc.*, 909 F.2d 1524, 1535 (3d Cir. 1990) (holding that "evidence of injury to a competitor may satisfy the component of competitive injury" required by the Act), cert. denied, 499 U.S. 921 (1991).

dealer, the court of appeals erred in holding Volvo liable for price discrimination under the Act.

B. The Court of Appeals Improperly Found A Violation Of The Act Because Volvo Did Not Engage In Price Discrimination In Any Transaction In Which Reeder Was Competing With Another Volvo Dealer

In upholding the jury verdict finding Volvo liable under the Robinson-Patman Act, the court of appeals expanded the law's reach in a manner foreclosed by its language and purpose and by decisions of this Court requiring (at a minimum) proof of price discrimination between competing purchasers or between purchasers whose customers are competing with one another. *Morton Salt*, 334 U.S. at 47; *Falls City*, 460 U.S. at 436. Cf. *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 201 (1974) (refusing to extend the Act "beyond its clear language to reach a multitude of local activities that hitherto have been left to state and local regulation"). In this case, there simply was no evidence that Volvo engaged in price discrimination in any transaction in which Reeder actually competed with another Volvo dealer for a sale. The court reached its erroneous conclusion by treating the statutory requirements, the "conditions which make a price difference illegal or legal," *Anheuser-Busch*, 363 U.S. at 550, as a collection of independent hurdles, unrelated to one another or to the purpose of the statute, rather than as an "integrated statutory scheme," *ibid.*

1. The court began its analysis with the statutory requirement that there be discrimination "between different purchasers," 15 U.S.C. 13(a)—the "two-purchase requirement." Pet. App. 8a-11a. Correctly recognizing that "an unsuccessful bidder is not a purchaser" for that purpose, *id.* at 9a,[10] the court focused—solely for purposes of that require-

[10] See, *e.g.*, *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 755 (1947) ("[N]o single sale can violate the Robinson-Patman Act. At least

ment—on the evidence relating to the four retail sales that Reeder made (for which it was not competing with any other Volvo dealer). Because Reeder purchased trucks from Volvo in connection with those sales, the court of appeals concluded, Reeder had "'purchaser' status" entitling it "to pursue a claim for price discrimination." *Id.* at 10a. The court did not require any showing that goods were purchased for resale in competition with another purchaser of comparable goods from the same supplier, as would obtain in the paradigmatic scenario in which a chain store and an independent store purchase products with an eye towards reselling them to the same customers. See, *e.g.*, *M.C. Mfg. Co.* v. *Texas Foundries, Inc.*, 517 F.2d 1059, 1068 (5th Cir. 1975) (defen-

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two transactions must take place in order to constitute a discrimination."); *Hasbrouck*, 496 U.S. at 577 (Scalia, J., concurring in the judgment) (violation of Robinson-Patman Act requires proof that, *inter alia*, "the seller discriminates in price between purchasers"); *Shaw's, Inc.* v. *Wilson-Jones Co.*, 105 F.2d 331, 333 (3d Cir. 1939) ("The discrimination in price referred to [in the Robinson-Patman Act] must be practiced 'between different purchasers.' * * * It does not mean one who seeks to purchase, a person who goes into the market-place for the purpose of purchasing. In other words, it does not mean a prospective purchaser, or one who wishes to purchase, as the appellant contends."); *Terry's Floor Fashions, Inc.* v. *Burlington Indus., Inc.*, 763 F.2d 604, 615 (4th Cir. 1985) (affirming dismissal of Robinson-Patman claim in absence of allegations or proof of "two comparable, completed sales"); *M.C. Mfg. Co.* v. *Texas Foundries, Inc.*, 517 F.2d 1059, 1067 & n.17 (5th Cir. 1975) (bidders competing for same contract cannot satisfy Act's two-purchase requirement), cert. denied, 424 U.S. 968 (1976); but see, *e.g.*, *Allied Accessories & Auto Parts Co.* v. *General Motors Corp.*, 901 F.2d 1322 (6th Cir. 1990) (affirming award of damages for Robinson-Patman violation where plaintiff was disappointed competitive bidder); *American Can Co.* v. *Bruce's Juices, Inc.*, 187 F.2d 919, 924 (5th Cir.) (stating that plaintiff was not obligated to make purchase at discriminatory price to obtain relief under the Act where the failure to make the purchase "was directly attributable to defendant's own discriminatory practice"), modified on other grounds, 190 F.2d 73 (5th Cir. 1951).

dant not liable under the Act for price discrimination where "his buyers are not in competition for the same ultimate users"), cert. denied, 424 U.S. 968 (1976); 14 Herbert Hovenkamp, *Antitrust Law* ¶ 2333b, at 89 (1999) (favored and disfavored purchasers "must be competing resellers, which is what the statute means when it speaks of injury to the disfavored purchaser's ability to compete with the favored purchaser") (footnote omitted).

In support of its view that any purchase—no matter how unrelated to the challenged discrimination in pricing—suffices to satisfy the two-purchaser requirement, the court of appeals cited only *DeLong Equip. Co.* v. *Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1202 (11th Cir.), cert. denied, 510 U.S. 1012 (1993), which it characterized as "recognizing that even 'minimal sales' (i.e., minimal purchases from manufacturer) made by an otherwise unsuccessful bidder are enough for [a] bidder to state" a claim under the Act. Pet. App. 11a. But *DeLong* involved "minimal sales" by one distributor to another distributor's *customer*, Pratt. The minimal sales to Pratt established that the two distributors, who received different prices from the defendant supplier, "directly competed" for sales to Pratt, and "were after the same Pratt dollar." *DeLong*, 990 F.2d at 1202. There would have been no need for the Eleventh Circuit to rely on the "minimal sales" if it had been following the approach of the court of appeals here, because both distributors routinely purchased from the defendant supplier. *Id.* at 1190.

Unlike in *DeLong*, Reeder and the favored dealers against which Reeder compared its purchases did not compete to resell the trucks they purchased to the same customers. To the contrary, the evidence showed that Reeder and the other Volvo dealers only made their purchases from Volvo once they had won their competitive bids and secured a customer. Because Reeder and the favored dealers were not competing for the same customers when they made their respective

purchases, they were not "different purchasers" in "competition" with each other in the sense required by the Act.[11]

2. The court of appeals also erred in concluding that Reeder was in "actual competition" with the favored Volvo dealers. Pet. App. 11a-12a. The court reasoned that "as of the time the price differential was imposed, the favored and disfavored purchasers competed at the same functional level * * * and within the same geographic market." *Id.* at 11a (quoting *Best Brands Beverage, Inc.* v. *Falstaff Brewing Corp.*, 842 F.2d 578, 585 (2d Cir. 1987)). Relying on evidence that Reeder sold or delivered trucks in many States and made sales or bids in three States in particular, that other Volvo dealers also made sales or bids in those States, that Reeder "competed directly" with other Volvo dealers in two instances, and that customers could travel to purchase heavy trucks, the court found that the record supported a jury finding that Reeder was in actual competition with favored dealers. *Id.* at 11a-12a. But the court ignored that Volvo dealers generally did not compete in the same solicitations

[11] Reeder's Robinson-Patman Act claim fails for that reason. The statute's requirement of two purchases also means that Reeder's claim simply cannot succeed, even assuming it had demonstrated that Volvo discriminated with respect to its price quotes to Volvo dealers in head-to-head competition for a single sale. In this case, purchases were made as a result of special-order bidding such that, for every completed sale, there was only one successful bidder and hence only one purchaser from Volvo. The two-purchase requirement would therefore bar Reeder from complaining that differing discounts on sales by Volvo caused it to lose the bid. See note 10, *supra*. That result is consistent with the Act's focus on competition in connection with the distribution of fungible goods. See Pet. App. 27a-28a (Hansen, J., concurring in part and dissenting in part). Of course, even if the textually rooted two-purchase rule were to be relaxed to account for the special context of special-order bidding, the absence of any evidence of price discrimination in the rare instances in which two Volvo dealers competed for the same order would suffice to preclude a finding of a Robinson-Patman Act violation here.

and failed to recognize that, when they did, Volvo's policy was to offer each the identical discount. There is no evidence here that Volvo deviated from that policy in the rare instances in which Reeder competed head-to-head with another Volvo dealer for the same customer. In the absence of discrimination between resellers actually competing for the same customers, there can be no Robinson-Patman violation.

The *Best Brands* standard applied by the court of appeals may make sense in the context of the chain store and independent retailer that Congress had in mind in adopting the Act, but it was misapplied here to obscure the absence of actual competition in the particular market at issue. As Judge Hansen pointed out, although Volvo dealers may "have competed against each other" in a market "to receive the opportunity to bid on potential sales to customers" in a broad geographic area, "[o]nce bidding begins, * * * the relevant market becomes limited to the needs and demands of a particular end user, with only a handful of dealers competing for the ultimate sale." Pet. App. 28a-29a. That dealers bid for sales in the same multistate area, or that customers and trucks may travel, does not show that the Volvo dealers were in actual competition for the same sales in any sense relevant to the Act, for they never purchased trucks with an eye toward reselling them to the same customer, and they rarely even bid against one another. Indeed, the court of appeals identified only two occasions over the course of the five-year franchise term on which Reeder was in actual competition with another Volvo dealer for the same sale. Pet. App. 4a, 11a-12a. And on those isolated occasions, Volvo did not engage in price discrimination between Reeder and the competing dealer. See p. 4, *supra*. The court erred in treating that head-to-head competition—which was devoid of price discrimination between Volvo dealers—as a license to pursue claims that did not involve actual competition for a sale or the kind of competitive injury that the Act addresses.

3. The court of appeals' conclusion that there was sufficient evidence for a jury to find the requisite competitive injury is necessarily flawed as well, because it is predicated on the erroneous finding that Volvo engaged in price discrimination in a transaction in which Reeder was competing with a favored dealer. As explained above, there was no evidence of such a transaction. Accordingly, Reeder could not prove competitive injury either through direct evidence of lost sales or profits as a result of the price discrimination or by establishing the prerequisites to application of the *Morton Salt* inference. Pet. App. 15a (citing *Rose Confections, Inc.* v. *Ambrosia Chocolate Co.*, 816 F.2d 381, 385 (8th Cir. 1987)).

a. Contrary to the court's conclusion, Reeder did not make the first showing, because, in Reeder's two instances of head-to-head competition with other Volvo dealers, it neither purchased Volvo trucks (as required by the Act's text) nor lost sales because of discriminatory concessions. Because Volvo did not engage in price discrimination between competing Volvo dealers, it is not surprising that Reeder offered no direct evidence of lost sales or profits resulting from price discrimination.[12]

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[12] The absence of evidence that price discrimination caused a diversion of profits from Reeder to the favored dealers stands in stark contrast to cases in which violations of the Robinson-Patman Act have been found. For example, in *Rose Confections*, 816 F.2d at 385-386, the disfavored chocolate-chip rebagger provided testimony that it lowered its prices to customers in response to competition from the favored customer and unsuccessfully sought business from potential clients who then bought from the favored distributor. No such evidence was adduced here. See *Hasbrouck*, 496 U.S. at 571 ("respondents introduced evidence describing the diversion of their customers to specific stations supplied by Dompier"); *Falls City*, 460 U.S. at 437 & n.8 (finding of violation "supported by direct evidence of diverted sales"); *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 518 (1963) (evidence that customers of disfavored dealers "shifted their patronage" to the favored dealer); *DeLong*, 990 F.2d at 1202 (evidence that disfavored and favored purchaser solicited and sold to the same customer); *J.F. Feeser*, 909 F.2d at 1535-1537 (reversing summary judgment for supplier on Robinson-Patman claim where disfavored wholesaler offered evidence that it lost customers to favored wholesaler on account of price differences). Cf. *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 564 n.4 (1981) (observing that claim that auto dealer suffered injury compensable under Robinson-Patman Act in the absence of evidence of diversion of sales is "particularly weak" but finding it unnecessary to decide whether such evidence is required).

The evidence comparing the concessions offered to Reeder on particular sales to concessions available to other Volvo dealers in connection with different sales (on which Reeder did not bid) "simply is not relevant to proving a violation of the [Act] because there was no actual competition between the two dealers at the time of the sales to the separate and different end users." Pet. App. 29a (Hansen, J., concurring in part and dissenting in part). The evidence may suggest that Reeder might have made more sales and earned larger profits had Volvo offered it more favorable concessions. But such lost sales or profits would be attributable to the *size* of the concessions Volvo offered Reeder, not to the alleged fact that Volvo offered other dealers more favorable concessions —*i.e.*, to price, not price discrimination. The existence of allegedly comparable sales on which Reeder did not bid made no difference to Reeder's success or profitability with respect to the sales on which it did bid. Thus, Reeder's real complaint is not that it suffered price discrimination relative to favored Volvo dealers, but rather that Volvo did not offer it more substantial concessions that would have enabled it to bid more successfully against non-Volvo dealers. The Act, however, is concerned with the competitive effects of price discrimination; it does not require a supplier to charge, or offer, a price that will enable a particular purchaser to resell profitably.

Moreover, the court of appeals pointed to no evidence that the less favorable concessions offered to Reeder in connection with its sales had any influence on Reeder's opportunities vis-a-vis other Volvo dealers to bid for sales. Even had there been such evidence, it would not establish a violation of the Act. Permitting liability to be predicated on transactions in which the disfavored and favored purchasers did not compete, as the court of appeals did here, would impermissibly dilute both the two-purchaser and the competitive injury requirements. The court's holding also threatens to convert the law into a guarantee of equitable treatment to franchisees, rather than a targeted protection against price discrimination between purchasers in actual competition, and extends the Act in a manner that would compel a level of price rigidity contrary to the goals of the antitrust laws. See Part C, *infra*; *Great Atl. & Pac. Tea Co.*, 440 U.S. at 80 (warning "against interpretations of the Robinson-Patman Act which extend beyond the prohibitions of the Act and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation") (internal quotation marks omitted). Even assuming the Act covered the injury alleged here, its attenuated nature would call for Reeder to provide concrete evidence of diversion of sales or profits to the favored dealers on account of the price differences. Reeder presented no such evidence.

The court of appeals also relied on evidence that Volvo intended to reduce the number of its dealers during the relevant time period. Pet. App. 15a-16a. But the antitrust laws do not require a business to preserve without change its existing distribution system. The Robinson-Patman Act is not an insurance policy that protects competitors from business practices perceived to be unfair. See *Brooke Group*, 509 U.S. at 225 (the antitrust laws "do not create a federal law of unfair competition or purport to afford remedies for all torts committed by or against persons engaged in interstate com-

merce") (internal quotation marks omitted). Whatever harm Reeder allegedly suffered in its business relationship with Volvo cannot be attributed to price discrimination between competing dealers, and it therefore cannot seek refuge under the Robinson-Patman Act. Cf. Pet. App. 23a-27a (upholding jury finding that Volvo violated Arkansas Franchise Practices Act).

b. The court of appeals also erred in holding that Reeder was entitled to the *Morton Salt* inference, which permits competitive injury to be inferred from proof of substantial price discrimination between competing purchasers. *Morton Salt*, 334 U.S. at 47, 50. That inference is unavailable to Reeder for the fundamental reason that, as discussed above, Reeder and the favored dealers were not "competing purchasers" in connection with the scattered instances of price discrimination that Reeder identified over the five-year period.

More broadly, the *Morton Salt* inference should not be invoked blindly to permit findings of Robinson-Patman Act liability where a direct causal link between price discrimination and competitive harm is lacking. Rather, the inference is warranted only to the extent that it yields generally valid predictions about injury to competition. This Court has recognized that even sustained price discrimination between competing purchasers—which Reeder failed to show here—will not always trigger the inference, concluding that the inference "simply will not arise" in cases where "a functional discount is legitimate." *Hasbrouck*, 496 U.S. at 571.

For the same reason, the *Morton Salt* inference also is not appropriate when the disfavored purchaser has ample alternative suppliers. For example, a disfavored purchaser is unlikely to be harmed by discrimination unless either the seller has significant market power or the favored purchaser is significant enough to sellers to demand concessions

unavailable to others.[13] Cf. *Hasbrouck*, 496 U.S. at 580 (Scalia, J., concurring in the judgment) (observing that if a supplier charges less to wholesalers than to retailers and the differential is passed on to the wholesalers' retail customers, competition among retailers cannot be injured if all retailers have the option to purchase from the wholesalers).[14]

C. Extending the Robinson-Patman Act To Reach Volvo's Conduct Would Undercut The Pro-Competitive Policies Of The Antitrust Laws

Even if the language of the Robinson-Patman Act were sufficiently ambiguous to permit the court of appeals' expansive construction, that result would contravene this Court's instruction that the Act "should be construed consistently with broader policies of the antitrust laws." *Brooke Group*, 509 U.S. at 220. Extending the Robinson-Patman Act to reach Volvo's conduct here would not advance Congress's goal of preventing price discrimination that impairs a disfavored purchaser's ability to compete with the favored purchaser. It would, moreover, be likely to lead to anti-competitive consequences.

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[13] The Federal Trade Commission considered those issues in accepting a recent consent order in which all five Commissioners suggested that market power should be viewed as a prerequisite to application of the *Morton Salt* inference. See *McCormick & Co.*, FTC Complaints and Orders, CCH Trade Reg. Rep. [1997-2001 Transfer Binder] ¶ 24,711 (Apr. 27, 2000).

[14] As with analysis of other vertical relationships, the absence of market power in a Robinson-Patman case can indicate that a practice has no potential to harm competition generally. See Hovenkamp, 68 Antitrust L.J. at 126 ("a manufacturer cannot profit by weakening its own distribution system or reducing that system's competitiveness"). See also John L. Peterman, *The Salt Producers' Discount Practices Before and After the Robinson-Patman Act and the FTC's Challenge to Them: The Morton and International Salt Cases*, FTC Bureau of Economics Staff Report 441-454 (1995).

Volvo utilizes its dealers to market and distribute its heavy-duty trucks, in competition with other manufacturers of heavy-duty trucks. Concessions granted to dealers allow Volvo to tailor its pricing to the competitive needs facing Volvo and its dealers in a particular situation. Pet. App. 2a-3a; cf. *Metro Ford Truck Sales, Inc.* v. *Ford Motor Co.*, 145 F.3d 320, 323 (5th Cir. 1998) (noting that Ford "Competitive Price Assistance" to Ford heavy-duty truck dealers ensured that Ford dealers could meet competition from other truck manufacturers in light of "the competitive situation surrounding the particular transaction"), cert. denied, 525 U.S. 1068 (1999). Imposing liability for differences in concessions offered to dealers bidding on different sales would limit suppliers' ability to tailor prices to the competitive situation, and thus diminish the vigor of interbrand price competition.[15]

The court of appeals relied on the Volvo Vision program, which was intended to meet Volvo's challenges by revamping its dealer network, Pet. App. 3a, as evidence supporting Reeder's claim of discriminatory concession practices, *id.* at 16a, and actual injury of the kind the antitrust laws are intended to prevent, *id.* at 19a. But, as this Court recognized nearly 30 years ago, the market impact of vertical practices, such as changes in distribution systems, may be a "simultaneous reduction of intrabrand competition and stimulation of interbrand competition." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 51-52 (1977). Because interbrand competition "is the primary concern of antitrust law," *id.* at 52 n.19, courts should be reluctant to interfere with a sup-

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[15] Cf. 14 Herbert Hovenkamp, *Antitrust Law* ¶ 2301a, at 4-6 (1999) (arguing that even where a manufacturer's dealers do compete with each other, differential prices to them would likely provide efficient incentives and would, but for how courts have construed the Robinson-Patman Act, likely be a lawful vertical practice under the antitrust laws).

plier's ability to structure its vertical distribution network efficiently. The Robinson-Patman Act plainly would not prohibit Volvo from simply terminating unwanted dealers in the interest of "achiev[ing] certain efficiencies in the distribution of [its] products." *Id.* at 54. The Act should not be stretched to forbid a manufacturer to achieve the same result by offering some dealers less favorable terms, but without engaging in the kind of price discrimination between competing purchasers that was the subject of congressional concern and that falls within the express terms of the Act. Any remedy for such practices lies in state laws addressing unfair competition and the rights of franchisees, not in the Robinson-Patman Act.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

R. HEWITT PATE
Assistant Attorney General

THOMAS G. HUNGAR
Deputy Solicitor General

MAKAN DELRAHIM
Deputy Assistant Attorney General

JONATHAN L. MARCUS
Assistant to the Solicitor General

WILLIAM BLUMENTHAL
General Counsel
Federal Trade Commission

CATHERINE G. O'SULLIVAN
DAVID SEIDMAN
Attorneys

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